JD–208–97
Owensboro, KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL FISH & MEATS d/b/a
FIELD PACKING COMPANY

and Case 25-CA-25328

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 227, AFL-CIO

Michael Beck, Esq. and *Andrew Stites, Esq.,*
of Indianapolis, IN, for the General Counsel.
Jairus M. Gilden, Esq., of Chicago, IL, for
the Charging Party.
William Michael Schiff, Esq. and *Steven K. Hahn, Esq.,*
of Evansville, IN, for the Respondent-Employer.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge. This case was tried before me in Owensboro, Kentucky, on August 25, 26, and 27, 1997, pursuant to an Amended Complaint and Notice of Hearing (the complaint) issued by the Regional Director for Region 25 of the National Labor Relations Board (the Board) on August 5, 1997. The complaint, based on an original charge filed on April 28, 1997[1] and an amended charge filed on June 5, by United Food and Commercial Workers Union, Local 227, AFL-CIO (the Charging Party or Union), alleges that International Fish & Meats d/b/a Field Packing Company (the Respondent or Employer) has engaged in certain violations of the National Labor Relations Act (the Act). The Respondent filed an answer to the complaint on August 18, denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent discharged four employees, and engaged in numerous independent violations of Section 8(a)(1) of the Act including coercive interrogation, creating the impression among its employees that their union activities were under surveillance, threats to discharge employees, threats of assigning more onerous working conditions to employees, and threats of unspecified reprisals in retaliation for the employees union sympathies and activities.

[1] All dates are in 1997 unless otherwise indicated.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Respondent.[2]

Findings of Fact

I. Jurisdiction

The Respondent is a corporation engaged in the packing and processing of meat products, with an office and place of business in Owensboro, Kentucky, where it annually purchased and received goods and materials at its facility in excess of $50,000 directly from points outside the Commonwealth of Kentucky. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *Background*

The Respondent's business requires it to slaughter hogs that are then processed in all facets of finished pork goods including hot dogs, hams, and bacon. They also process poultry, turkey breast, chicken breast and beef products. It is composed of six departments and employs approximately 450 production and maintenance employees. The facility is governed by United States Department of Agriculture (USDA) regulations and four USDA inspectors are employed on site to inspect the kill floor, smoked meat's department, sausage processing area and the night sanitation department.

The pertinent supervisory structure in the subject case includes Director of Personnel Ron Neal, Human Resources Manager Joe Brand, Sectional Supervisor Gary Coleman and First Line Supervisors Bruce Evans, Glen Farmer and Gary Morris.

Evans was instrumental in obtaining jobs at Respondent for employees Shane Mattingly and Matt Rusher. In this regard, Evans is Mattingly's Uncle and Evans and Rusher's father are good friends.

B. *The Union Campaign*

In early November 1996, employee Shane Mattingly contacted Union Director of Organizing H. Bruce Finley to inquire about organizing the employees at Respondent. Mattingly told approximately five or six of Respondent's employees that Finley was coming to his house to discuss the possibility of forming a union but only one other employee appeared for the initial meeting in mid-November 1996. At the meeting, Finley gave Mattingly approximately 100 union authorization cards that Mattingly along with fellow employees Bill Burns and Willie McKenzie distributed over a one week period prior to the Thanksgiving holiday. A second Union meeting was held at Mattingly's house in November 1996, and five employees attended. Thereafter, the Union began having weekly meetings at the Holiday Inn Hotel in Owensboro, all of which were attended by Mattingly.

[2] The Respondent's unopposed motion to correct the transcript, dated September 30, is granted and received in evidence as Respondent Exh. No. 31.

C. *The 8(a)(1) Violations*

1. Allegations concerning Bruce Evans

The day after the first Union meeting in mid-November 1996, Evans and Mattingly had a conversation in the mold room before starting work. Evans said, " What's this I hear about the Union shit?" "He asked Mattingly what Union it was, how many people went to the meetings and how many meetings took place?" Mattingly replied, that he did not know what he was talking about. Evans further said, "all you are going to do is get a bunch of other people caught up in something they do not know anything about and you are going to get yourself fired along with other people." "We are going to be weeding them out." Evans told Mattingly to let him know about the next union meeting and said that you will never get a Union in here.

Shortly after the meeting, Mattingly contacted Finley who suggested that the next time something like this happened he should tape the conversation. For this purpose, the Union provided Mattingly with a tape recorder and two blank cassette tapes.

In November 1996, but prior to the Thanksgiving holiday, Willie McKenzie had two separate conversations with Evans about the Union.[3] In the first conversation, which took place by the bathroom, Evans told McKenzie that the guys were digging themselves in a hole and passing Union stuff was going to get them out of there. About this same time, according to McKenzie, Evans was going around and telling employees on the hambone line that they better stay out of the meetings or you are going to get in trouble. Several days after this conversation, as McKenzie was preparing to go to work, Evans came out of his office and said, "these motherfuckers go to this Union meeting and all these motherfuckers going to be gone like that." McKenzie replied, "you know who you are talking to." Evans said, "you all know who you are." "You keep on fucking digging yourself in a fucking hole, you're all going to be fucking gone." Evans then said, "that while Mattingly is his nephew and is a good worker, he is going to be out of here and he is going to watch all these guys go."

2. The Tape Recordings

In late November 1996, Mattingly went to Evans office to ask about when he could take some time off and use his floating holiday. Before entering the office, Mattingly turned on the portable tape recorder that he had in his shirt pocket. Evans asked Mattingly, whether he thought about what he told him in the first meeting and Mattingly replied, a whole lot. Evans said, "They're trying to weed them out." You know it too. Think about it. What you do is your own business; If what you think you are doing is right, you ought to go for it.

[3] McKenzie was previously employed at Respondent from August 1993 to February 14, when he was terminated for violating the attendance policy. McKenzie learned about the Union from Mattingly, signed and passed out union authorization cards and regularly attended union meetings. The Union filed an unfair labor practice charge with the Board concerning his discharge but it was subsequently withdrawn. Thus, the subject case does not include McKenzie as an alleged discriminatee.

Approximately three weeks after the above noted late November 1996 conversation, Evans called Mattingly into his office. Once again, Mattingly taped the conversation. Evans asked Mattingly, "whether he was still pushing the Union thing?" Mattingly replied, "that he was not." Evans said, "I don't understand what the fuck you're doing here." "I don't really understand it at all." "I don't know who's brainwashed you on this thing but whoever it is, a fuckin union." "Is it Tony?" "Is Tony in the union thing?" "Is that where you get this shit from?" Evans then said, "I don't even know where you think a union could do any, anything different than what they do down here." Mattingly replied, "Treatment." Evans said, "You want treatment, let me give you treatment." "You get a goddammed union in down here and I guarantee to you the little things you guys do, the little things we let you do, that won't be no more." "You won't get none of that." "You don't ask off and get off." "You won't chew tobacco and fuckin get caught with it and not be fired."

Employee Matt Rusher returned to work in late October or early November 1996, after missing two weeks because of tendonitis in his hand. On his second day back, Evans called Rusher into his office and asked about his hand. Evans then said that a number of people are trying to organize a Union and somebody reported that they observed your truck at the Union meeting on the previous evening. Rusher replied that he did not know what Evans was talking about. After this conversation, Rusher testified that Evans came to the boning line on several occasions and began talking about the Union. He said things like joining a union is no guarantee to better working conditions or more pay and if you stay with it, you are just going to get yourself in trouble.

On December 8, 1996, Rusher and Bill Burns were called to a meeting with Gary Coleman and Evans. Coleman asked both employees whether they would consider becoming Group Leaders on the boning line. Burns asked whether the job would involve a pay raise. Coleman said no, and both employees declined the offer. Evans said, "that's one of those fucking Union things again," and "the Union thing, is getting to your head."

On December 6, 1996, employee Bill Burns was working on the boning line when Group Leader, Bobby Phillips, told him to go to Randy Coleman's office to talk to Evans. A person by the name of "Red" was also present in the office. Burns had a tape recorder in his pants pocket and taped the conversation.

Evans opened the conversation and said, "Bill, I tell ya, you are digging yourself a hole down there, goddamm it." "I ain't going to lie to you, the last few week's they have been on my fucking ass." "I talked to everybody I know to talk to about this union thing." "I know you are a union guy, just between you and me, Red ain't going to say anything." "I don't care, you guys do whatever you think you need to do." "Somebody had told you, believe this or not, the wrong priority on this fuckin union thing." "They're going to get you fired before you ever get the motherfucker in the door." Evans further said, "The bottom line is these motherfuckers are not going to forgive you." "I'm telling you they don't forget shit like that." "This activity going on down here now, and what you said yesterday, you are a fuckin a. . ., you could be like my nephew back there, you could be a kingpin in this too, you know, that's what they could be thinking." Lastly, Evans said, "If this thing goes union, some of these guys in here think of us as the enemy." "If you think we are the enemy now, what do you think it would be like here if the union gets in?"

Mattingly testified that he brought the tape recorder to work every day between the first and second conversation that he had with Evans. After the second taped conversation with Evans in December 1996, he took the tape recorder home and put it in his wife's locked jewelry box. Except for one time when Mattingly listened to both conversations, the tape recorder

remained in the jewelry box until he gave it to Union representative George Shepherd in April 1997. Burns testified that after the December 6, 1996, conversation with Evans, he took the tape recorder home and secured it in his dresser drawer. The tape recorder was not used again and remained in the dresser drawer until April 1997, when Burns gave it to Shepherd.

Shepherd testified that he received the Mattingly and Burns tapes in April 1997, and made copies of both tapes at his home before placing them in an office file cabinet where they remained until the subject hearing. During the copying process, Shepherd tried to remove some of the background noise but did not alter the tapes in anyway. Shepherd instructed one of the secretaries in his office to prepare typewritten transcripts of both tapes and conceded on the Mattingly tape that there is a minute break where there is no noise or conversation. He testified that the reason for this is because of the two separate conversations that took place between Evans and Mattingly. Shepherd acknowledged that both tapes have inaudible and unintelligible portions contained therein but that he was able to compare and contrast the tape recordings with the transcripts and the transcripts are an accurate recitation of the conversations that took place among Evans, Mattingly and Burns. Likewise, both Mattingly and Burns reviewed the transcripts during the hearing and testified that the transcripts are an accurate written reporting of what was said in their conversations with Evans and what is contained on the tapes.

The Respondent objects to the introduction into evidence of both tape recordings and the attendant transcripts primarily on the basis of inaccuracies in comparing the transcripts to the tapes and the large number of unintelligible items which are in parenthesis throughout the transcripts that renders the entire contents of the tapes untrustworthy. In that regard, Respondent relies on the case of *United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983) to support its position. I find the Respondent's reliance on the *Robinson* case to be misplaced . First, unlike the instant matter, that case concerned a criminal matter. Second, the Court noted that admission of tape recordings at trial rests within the sound discretion of the trial court and the admissibility of transcripts of tape recordings presumes that the court has predetermined that unintelligible portions of the tape do not render the whole recording untrustworthy.

I received both tapes and the transcripts into evidence because the parties offering the tapes (Mattingly, Burns and Shepherd), were either participants to the conversations involving the alleged commission of unfair labor practices against them and have testified without rebuttal to their accuracy or listened and compared the tape recordings with the transcripts and determined without contradiction that they were accurate. Therefore, these recordings and transcripts are both relevant and probative of the subject events. Moreover, in similar circumstances, the Board in *Wellstream Corp.* 313 NLRB 698, 711 (1994), sustained the judge's admission into evidence of tape recordings involving alleged Section 8(a)(1) conduct.[4]

3. Analysis-Allegations Concerning Bruce Evans

[4] While I did not personally listen to the tapes during the course of the hearing, I relied on and credited the testimony of Shepherd, Mattingly and Burns as to their authenticity and reliability. Before preparing the subject decision, however, I listened to both tape recordings, compared and contrasted them to the respective transcripts, and found the tapes to be accurate and authentic as to the conversations involved and find them to be relevant and probative of the issues in this case. As will be discussed more thoroughly later in the decision, I credit the testimony of Mattingly and Burns as to what was said during their conversations with Evans. I also note that Respondent was provided the tape recordings in advance of the hearing and had ample time to listen to both conversations.

The General Counsel alleges in the complaint that Evans engaged in Section 8(a)(1) conduct in the first week of November, 1996 (paragraph 5a), in early November, 1996 (paragraph 5b), in mid to late November, 1996 (paragraph 5c), in mid-December, 1996 (paragraph 5d), in the first week of December, 1996 (paragraph 5e), in early December, 1996 (paragraph 5f), and in November or December 1996 (paragraphs 5h and 5i).

The record evidence shows that the first conversation wherein the Union was discussed occurred between Evans and Mattingly in mid-November 1996. Also, around this time, a conversation took place between Evans and Rusher. Thereafter, Evans and Mattingly had two subsequent conversations; one took place about two weeks after the first conversation but still in November, and the next conversation took place about three weeks later placing it in December 1996. Likewise, McKenzie had two separate conversations with Evans both occurring in November 1996, but prior to the Thanksgiving holiday. On December 6, 1996, a conversation between Evans and Burns took place. Lastly, on December 8, 1996, Rusher and Burns participated in a conversation with Coleman and Evans. This was the entire testimony presented by the General Counsel that concerned alleged Section 8(a)(1) conduct undertaken by Evans. Therefore, the following discussion will focus solely on those conversations and whether the Act has been violated.

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Aimet, Inc.,* 987 F.2d 445 (7th Cir. 1993); *Reeves Bros.,* 320 NLRB 1082 (1996).

Evans testified during the Respondent's case in chief and made numerous admissions against interest. He acknowledged that in November 1996, sometime before Thanksgiving, he received a telephone call at home from a former employee named Rob Crow. The employee told Evans that some union activity was ongoing at the plant and it centered in one of Evans departments. The employee, after some prodding from Evans, told him that Shane Mattingly was the kingpin of the Union campaign. Also around this period, Evans admitted that a number of employees on the boning line told him that Matt Rusher's truck was observed at the Holiday Inn and that he was attending a Union meeting. Evans also admitted that shortly after the telephone conversation with the former employee, he told Ron Neal that he thought there was some union activity taking place in the sausage department. Likewise, Evans testified that at the same time, he told Gary Coleman about the union activity in the sausage department and what the former employee told him about Mattingly's involvement. Evans further acknowledged, when presented with the transcripts of the two conversations that he had with Mattingly and the one conversation with Burns (General Counsel Exh. Nos. 4 and 6), that the transcripts were an accurate recitation of what he said in those conversations. For example, Evans admitted that he knew Burns supported the Union and that he told Burns that Mattingly was the kingpin and that Mattingly was going to get the other employees fired. Moreover, he testified that he tried to scare Burns away from engaging in union activity. Evans also admitted that he told Mattingly and Burns that he knew they were union guys and threatened both of them that bad things could happen if they messed around with the Union.

The testimony of McKenzie is unrebutted as Evans did not testify about those two conversations. Thus, I find that Evans made the statements imputed to him and said to McKenzie, that these guys are digging themselves in a hole, passing out this Union stuff and they will be out of here. Likewise, Evans said that his nephew is going to be out of here.

I find Mattingly credibly testified about the first conversation that he had with Evans in

the mold room, that Evans interrogated him about the Union and inquired how many union meetings were held and how many people attended the meetings. Evans also told Mattingly that he was going to get himself fired along with other people and that the Respondent would be weeding the employees out. Lastly, Mattingly credibly testified that Evans wanted to know about the next Union meeting so he could go and observe the participants.

With respect to the December 8, 1996, meeting that Burns and Rusher attended with Coleman and Evans, I find that after Burns and Rusher declined to assume the Group Leader positions and Burns said he did not want to inform on employees and get them fired, Evans said, "that's one of those fucking Union things again," and "the Union thing is getting to your head." In this regard, both Burns and Rusher credibly testified to this effect and Coleman acknowledged that Evans made the statements attributed to him.

In summary, employees Mattingly, Burns, Rusher, and McKenzie credibly testified concerning statements made by Bruce Evans. Likewise, Evans admitted that he interrogated and threatened employees about their union activities and that the statements he made in the transcripts of his conversations with Mattingly and Burns are accurate recitations of what he said to both employees. Therefore, I find that Bruce Evans made the statements imputed to him by the above noted employees. I further find that Evan's statements tend to coerce employees in the exercise of their Section 7 rights and they violate Section 8(a)(1) of the Act. Accordingly, I find those allegations in the complaint dealing with the three conversations that Evans had with Mattingly, the two conversations that Evans had with McKenzie, the December 6, 1996 conversation with Burns, the November 1996 conversation Evans had with Rusher and the December 8, 1996 conversation about the Group Leader positions that Evans had with Burns and Rusher to be violative of the Act. In all other respects, as it relates to allegations in the complaint concerning Evans, I do not find that the General Counsel introduced any evidence to establish such violations. With regard to the above noted violations, see *T&J Trucking Co.* 316 NLRB 771 (1995) (threatening discharge); *Flexsteel Industries,* 311 NLRB 257 (1993) (creating impression of surveillance); *Tube-Lok Products,* 209 NLRB 666, 669 (1974) (futility of selecting a union as collective-bargaining representative); *Conagra Inc.,* 248 NLRB 609, 615 (1980) (threatening employees with loss of benefits) and *House Calls, Inc.,* 304 NLRB 311, 319 (1991) (coercive interrogation).

I make these findings despite Respondent's vigorous attempt to isolate Evans as a maverick supervisor who went on a frolic and ignored the instructions of Ron Neal in late November or early December 1996, not to discuss, interrogate or threaten Respondent's employees about the Union. In this regard, Neal admitted that before Evans apprised him of union activity in the sausage department around Thanksgiving, he knew that union pamphlets and graffiti were found in the bathrooms at the plant. Neal, however, did not ask Evans in late November or early December 1996, whether he had any conversations with Respondent's employees about the Union. The record indicates that Evans held a number of conversations about the Union with several employees including Mattingly before Neal provided him oral and written instructions (Respondent's Exh. No. 29), not to interrogate or threaten employees. Thus I find that Evans, an admitted supervisor, interrogated and coerced employees in advance of any contrary instructions by Neal and reject Respondent's attempt to absolve itself of any responsibility for Evans unlawful acts and interrogation.

4. Allegations concerning Glen Farmer

The General Counsel alleges in paragraph 5g of the complaint that on an unknown date in early to mid-December 1996, Farmer interrogated employees about their Union membership and sympathies and informed employees that their Union activities were under surveillance.

Employee Bill Arnold first learned about union activity at Respondent's facility around late October or early November 1996, when he read about it on the bathroom walls. Shortly thereafter, he was approached by Shane Mattingly and asked to sign a Union card. He read and signed the card, and returned it to Mattingly.

After he signed the union card, Arnold had a conversation in November 1996 with Farmer in the sausage kitchen. Farmer said, he heard that Arnold was promoting the Union and asked if Arnold wanted to sign a Union card? Farmer also asked, what Arnold knew about the Union? Arnold told him about seeing information on the bathroom walls and Farmer told Arnold not to tell anybody about their conversation.

Farmer testified about a single conversation that he had with Arnold in December 1996. He asked Arnold if he heard some talk about the Union and Arnold replied, that he did not hear anything. Arnold then said he did not want his name mentioned either for or against the Union.

I credit the testimony of Arnold for a number of reasons. First, his presentation was clear and convincing and had a ring of truth to it. Additionally, as will be developed more thoroughly in the portion of the decision relating to Arnold's discharge, I am suspect of Farmer's testimony and his actions toward Arnold. Second, shortly after the November 1996 conversation between Arnold and Farmer, the walls of the bathroom were painted and any references to the Union were removed. It is noted that Ron Neal testified that he became aware of Union activity at the plant sometime in November 1996, when Union pamphlets and graffiti were found in the bathroom. I find that Farmer alerted Neal or Joe Brand about the Union pamphlets and graffiti on the bathroom walls after his conversation with Arnold, and shortly thereafter they were removed. Therefore, I reject Farmer's testimony that his conversation with Arnold took place in December 1996. Accordingly, I find that Farmer made the statements imputed to him.

Under these circumstances, I find that Farmer's November 1996 statements interfere with, restrain, and coerce employees in the exercise of their Section 7 rights, and they violate Section 8(a)(1) of the Act as alleged in the complaint.

5. Allegations concerning Joe Brand

The General Counsel alleges in paragraph 5j of the complaint that about December 18, 1996, Brand interrogated and threatened employees with unspecified reprisals if they formed, joined or assisted the Union and created the impression among employees that their Union activities were under surveillance. Additionally, in paragraphs 5m and n, it is alleged that about February 12, Brand interrogated employees about their union membership and activities and promulgated, maintained and enforced a rule which prohibited its employees from discussing the Union during work hours.

Willie McKenzie testified that on December 18, 1996, he was called to Brand's office and asked whether he witnessed an altercation between employee Matt Rusher and Supervisor Gary Coleman and if profanity was used by Rusher during the confrontation. During the course of the conversation, McKenzie testified that Brand asked him whether he thought Burns or Rusher was the leader or follower? McKenzie further testified that he knew what Brand was talking about and said, "This is about this Union stuff." Brand kind of laughed and McKenzie said, you know it's about the Union. Finally, according to McKenzie, Brand said, well, you know, these guys are going to be gone and later in the conversation said, we are not going to tolerate it, it's never been Union and there is never going to be one here. While Brand

admitted that he had a conversation with McKenzie on December 18, 1996, he denied ever using the terms "leaders and followers" but did not deny making the other statements attributed to him. I credit McKenzie's version of the conversation, as he testified in a sincere and forthright manner. Moreover, I find that Brand knew about the existence of union activity before the December 18, 1996 conversation with McKenzie and was aware of which employees were involved. In this regard the transcripts of the tapes for the conversations that Evans had with Mattingly and Burns, which took place before December 18, 1996, both refer to one or two four hour management meetings that Evans attended about the Union. It is reasonable to infer that those meetings were attended by Brand and the names of the leading union adherents were discussed.

Under these circumstances, I find that Brand made the statements attributed to him and that such statements tend to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights and therefore, violate Section 8(a)(1) of the Act as alleged in the complaint.

With respect to the allegations concerning Brand as alleged in paragraphs 5m and n of the complaint, they concern issues involving employee Shane Mattingly and will be discussed later in the decision.

D. *The 8(a)(1) and (3) Violations*

1. The termination of Matt Rusher

Matt Rusher commenced work at Respondent in October 1994, obtaining the job primarily on the recommendation of Bruce Evans, who was a family friend. He worked on the boning line until his termination on December 20, 1996.

In the last part of October 1996, Rusher missed two weeks of work because of tendonitis in his hand. Upon returning from sick leave in late October or early November 1996, he had a conversation with Evans. Initially, Evans asked Rusher about his hand and then told Rusher that a number of people were trying to organize a Union and someone saw his truck at the Holiday Inn attending a Union meeting. Rusher told Evans that he did not know what he was talking about.

On the same day of the above conversation, Rusher met with Shane Mattingly and Bill Burns during lunch and learned for the first time about the Union. Mattingly asked Rusher if he was interested in signing a union card and about a week later he was given a card by Mattingly. He signed the union card and returned it to Mattingly. Rusher testified that he did not engage in any other union activity, did not pass out union cards to other employees and did not wear any union insignia.

On December 8, 1996, Rusher and fellow employee Bill Burns were called to the office to meet with Randy Coleman and Bruce Evans. Both employees were asked if they would consider becoming Group Leaders. Burns asked whether they would receive a raise in pay and Coleman said no. Both Burns and Rusher declined to accept the position. During the conversation Coleman stated that he needed their help to let management know if certain of the younger employees were not doing their jobs. Burns said, if an employee needs help, I will go down and help them. I am not going to tell on somebody and get them fired. Evans said, "That's one of those fucking Union things again," and "the Union thing, it's getting to your dam head."

On December 16, 1996, Rusher was given an employee verbal warning report for recently missing two days of work and eight partial days in the recent past.[5] On the day that Rusher returned to work, Coleman instructed him to clean the boning table at the completion of the shift due to the amount of time that he missed the previous week.[6] Rusher became quite loud and said, "It fucking ain't right." I should not have to clean the line because there are more people with less seniority then I have and they also missed work. Coleman said, "Matt, tell me who those people are and we'll see whether or not they have missed less time or they have less seniority than you do." Rusher replied, "You're the fucking supervisor, You figure it out." Coleman replied that he was not going to sit and debate the issue but told Rusher it was his responsibility to clean the line. Rusher said that he was sick all week, felt bad and asked if he could clean the line next week rather then today. Coleman said that was all right, as long as it was taken care of next week.

Coleman instructed supervisor Gary Morris the following week to make sure that Rusher cleaned the boning table. Morris testified that he approached Rusher and asked him to clean the boning table at the completion of his work shift. Rusher said, in the presence of several other employees, "I think that's fucking bullshit and I ain't doing it." Morris went to see Coleman who told him that he had the same problem with Rusher the preceding Saturday and it was decided to refer the matter to Joe Brand in personnel to see if there was sufficient grounds for termination. Morris also went to see Bruce Evans about the Rusher incident and told Evans that, "I'm going to fire his ass." Before Morris officially referred the matter to personnel, Evans went to see Coleman. Evans told Coleman that Rusher had some personal problems going on, was on the edge and he felt that he could get Rusher under control. Coleman told Evans that he would consider keeping Rusher as an employee if several things were made clear to him. First, Coleman wanted to know if Rusher truly wanted to work at the

[5] Respondent has two types of disciplinary actions. First, an employee pink verbal warning report is issued followed by a written reprimand for more serious infractions.

[6] A long standing practice existed at the Respondent that if you missed days of work and you were the lowest person in seniority of those that missed work, you would be required to stay after work and clean the boning line. This consisted of picking up scraps of meat and raking them before placing the meat in a barrel. Then, you spray the line down with a high pressure hose to get all the meat off the floor. The job normally took between 45 minutes to one hour to complete. Needless to say, it was not a desirable job.

Respondent.[7] Second, Rusher had to work on his attendance and punctuality because they could not afford to have him missing days or regularly being late for work and third, Rusher was going to have to get his temper and attitude under control and not have anymore outbursts.

On December 19, 1996, Rusher was called to Brand's office. Brand told him, with Morris present, that a decision has to be made on his continued employment because of his outbursts with Coleman and Morris. Rusher was sent home early that day so the Respondent could reach a final decision on his continued employment. He was told to return the next day at 9:00 a.m. for another meeting.

Before Rusher left for the day, Evans told him that he wanted to talk to him before the meeting. They talked on the telephone that evening and Evans telephoned Rusher the next morning to remind him to come into the plant early so they could further discuss the matter. Upon arriving at the facility on the morning of December 20, 1996, Rusher went to Evan's office. Evans told Rusher that if he still wanted to work at Respondent and keep his job, he would help him. Rusher replied, "I do not want to work here anymore." Evans said, then there is no use talking to you anymore and let's go to Brand's office.

Brand testified that his secretary telephoned him in Ron Neal's office to inform him that Matt Rusher, Gary Morris and Bruce Evans were waiting in his office to see him. Upon arriving in his office, Evans started the meeting and said that he talked to Rusher who informed him that he is burned out, has other job opportunities and wants to pursue something else. Brand asked Rusher if that was true and Rusher said yes; I need a change and have some opportunities. Brand said that was fine and they talked about unemployment issues, health insurance entitlements and unused vacation. When the unemployment claim came in, Brand did not contest it and Rusher received unemployment compensation.

The General Counsel alleges in paragraphs 6a, b, and c of the complaint that Rusher was assigned more onerous job duties, was suspended for the balance of the shift on December 19, 1996, and was ultimately discharged on December 20, 1996 because of his support for and assistance to the Union. Likewise, the General Counsel alleges in paragraphs 5k and l that about December 20, 1996, Joe Brand and Bruce Evans urged an employee to quit his employment at Respondent.

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1993). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

[7] Rusher previously took a week's vacation in January 1996, to see if he wanted to work full time for the Ice Capades. Evans was instrumental in talking him out of this idea and he returned to his job at Respondent.

For the following reasons, I find that the General Counsel has made a showing that the Respondent was motivated by antiunion considerations. First, the evidence establishes that Evans was under the belief that Rusher attended a Union meeting in November 1996 at the Holiday Inn, and during the months of November and December 1996, Evans routinely made comments to the employees on the boning line about the Union. Second, in the December 8, 1996, meeting about the Group Leader position, Evans made several negative statements about the Union indicating his belief that Rusher and Burns were involved and supported the Union.

The burden shifts to the Respondent to establish that the same action would have taken place even in the absence of the employee's protected conduct.

For the following reasons, I find that the Respondent would have taken the same action even if Rusher had not engaged in protected activity. First, it must be noted that while Evans thought that Rusher attended a Union meeting at the Holiday Inn, Rusher testified that he knew nothing about the Union when he returned to work after a two week absence and did not attend the Union meeting. Significantly, Rusher testified that other then the one conversation with Evans and the statement by Evans in the December 8, 1996 meeting, he did not discuss the Union with any of Respondent's officials, did not pass out union cards to employees and did not wear any Union insignia.

The reason advanced by Respondent for Rusher's termination was because of his outbursts with Coleman and Morris and the failure to follow supervisory instructions. In this regard, Rusher initially argued with Coleman about cleaning the boning table, used profane and insulting language to him and ultimately refused to perform the assignment. When Rusher asked to be relieved of the assignment on that particular day because he felt sick, Coleman agreed after receiving assurances from Rusher that he would clean the boning table the following week. When Morris requested Rusher to clean the boning table the following week and Rusher refused, once again using profane language toward his supervisor and in the presence of other employees, Coleman and Morris jointly decided that termination might be appropriate. It was at that time that Evans attempted to intercede in order to save Rusher's job. Indeed, Rusher admitted that Evans talked to him about whether he still wanted to be employed at Respondent and if he wanted his job. I credit the testimony of Brand, Morris and Evans that during the December 20, 1996, meeting in Brand's office, Rusher stated he was burned out on boning hams and had other job opportunities. Thus, I find that Rusher voluntarily left his employment with Respondent and was not terminated. If there is any doubt, I find that Respondent would have terminated Rusher even if he had not engaged in protected conduct. My decision in that regard is based on Rusher's credibility. He refused to admit that he had a second outburst with Morris in which he used profane language or to acknowledge that he refused to clean the boning line despite receiving supervisory instructions to do so. Since I find that such an outburst did occur, it leads me to reject Rusher's testimony that he refused to quit his employment, as allegedly urged to do so during the December 20, 1996 meeting, by Brand and Evans. To the contrary, I find that Rusher told both Evans and Brand that he no longer wanted to be employed at the Respondent. Moreover, I find that Brand told Rusher that he would not contest his unemployment application which undermines Rusher's testimony that he refused to quit his employment because of his belief that one was not entitled to unemployment compensation if you quit your job. Lastly, Rusher initially denied receiving an employee verbal warning report for excessive absences but grudgingly was forced to admit same when the document was shown to him and introduced in evidence (Respondent Ex. No. 6).

For all of the above reasons, I do not credit Rusher's testimony regarding his termination

and specifically find that he was not terminated for his protected conduct. Likewise, I do not find that Rusher was suspended for the balance of his shift on December 20, 1996, nor assigned more onerous job duties on December 17, 1996, because of his Union activities. In this regard, I find that Rusher was sent home for the balance of the shift in order for Respondent to review and evaluate the evidence concerning the type of discipline, if any, that might be imposed and also find that an assignment to clean the boning line to an employee that missed work is a long standing past practice totally unrelated to protected conduct. Further, as discussed above, I find contrary to the General Counsel that neither Brand or Evans urged Rusher to quit his employment on December 20, 1996, because of his assistance or support of the Union. Rather, I find that Rusher voluntarily agreed to leave Respondent's employment.

In summary, I recommend that paragraphs 5k and l and paragraphs 6a, b, and c of the complaint be dismissed.

2. The Termination of Bill Arnold

Bill Arnold commenced employment at Respondent on April 14, 1994, and remained gainfully employed until he was terminated on February 10. During the last eight to ten months of his employment, he worked in the sausage kitchen under the direct supervision of Glen Farmer.

Arnold learned about the Union in late October or early November 1996, when he read some information about it on the bathroom walls. Shortly thereafter, he was approached by Shane Mattingly and asked to sign a Union card. He signed the card in early November 1996, and returned the card to Mattingly.

In November 1996, Arnold had a conversation with Farmer about the Union in the sausage kitchen. Farmer came up to Arnold and said, he heard that Arnold was promoting the Union. He also asked Arnold if he wanted to sign a Union card and what Arnold knew about the Union? Arnold told Farmer that he learned about the Union by reading about it on the bathroom walls. Farmer ended the meeting by telling Arnold not to tell anybody about their conversation. Within a week of this conversation, the bathroom walls were painted and all references to the Union were removed.

On February 7, upon returning from lunch, Farmer became aware that a USDA inspector went through the sausage kitchen and tagged a number of molds, tops and bottoms for having meat scraps on the equipment. Shortly thereafter, Farmer held a meeting with the sausage kitchen crew comprised of Tony Pullin, Tracy Barnett, Bill Arnold, Troy Kohmoff and John Riley, and asked them whether they knew the proper procedures for checking the molds before they were brought into the sausage kitchen. All of the employees stated that they knew that the molds were to be inspected to ensure that they were clean and were to be moved from one basket individually to another basket. Farmer asked who was responsible for hanging the equipment that was tagged and employees Barnett and Pullin said that they brought up the equipment. After checking with Joe Brand, it was decided to issue written reprimands to both of these employees.

Approximately an hour later, Farmer was walking through the process room and saw Arnold standing over a basket of tops. Farmer asked Arnold why he had segregated the tops, and Arnold replied that," they kind of look dirty." Farmer said, "Bill, we've been over this procedure; don't you know that you're supposed to go through the tops downstairs?" Arnold replied that he did not understand that procedure. Farmer testified that this concerned him, and he decided it was necessary for both of them to talk to Joe Brand.

Arnold went directly to Brand's office and arrived before Farmer. Arnold told Brand that he felt Farmer was picking on him and physically abused him. After Farmer arrived at Brand's office, a discussion took place about this issue and Brand determined that the allegations were inconclusive. The underlying incident about the basket of tops was discussed and Arnold conceded that he still did not understand the proper procedures but he did not think he was in the wrong.

After finishing the meeting on February 7, Brand sent Arnold home and told him to come back Monday morning and he would let him know whether he did or did not have a job. After Arnold's departure, Brand and Farmer reviewed his personnel file. Two previous warnings were uncovered for failure to follow instructions. Brand and Farmer agreed to think about the matter over the weekend and would get together on Monday morning before Arnold arrived to make a final decision about the status of his employment.

Farmer and Brand met on Monday morning and it was decided that Arnold would be terminated for not following instructions. When Arnold arrived on Monday morning, he met with Brand in his office and Brand told him that Farmer did not want him as an employee anymore, and his employment was going to be terminated. Arnold said, he needed to work and asked Brand whether he could be moved somewhere else in the plant. Brand replied, that he really did not think that any supervisor wanted him in their department but told Arnold to go ahead with his unemployment application and he would not contest it. About a week later, Arnold telephoned Brand who told his secretary to tell Arnold that no other supervisor would accept him as an employee.

For the following reasons, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in suspending and terminating Arnold. First, the evidence establishes that Farmer interrogated Arnold about his union activities in November 1996, and suspected Arnold as being one of the promoters of the Union. Second, a week after this conversation, in which Arnold told Farmer that he learned about the Union by reading about it on the bathroom walls, the bathroom was painted and all references to the Union were removed.

Under *Wright Line,* supra, the burden shifts to the Respondent to establish that the same action would have taken place in the absence of the employee's protected conduct.

The Respondent takes the position that Arnold was terminated for not following instructions. I find this defense to be wholly without merit and conclude it is pretextual. In this regard, it should be noted that employees Barnett and Pullin were issued written reprimands for their participation in the USDA tag being placed on the dirty molds and tops, yet they were not discharged. Moreover, Farmer admitted that Pullin had prior displinary warnings in his personnel file. Although Arnold admitted that he was unsure of the procedures of segregating tops before they were brought to the sausage kitchen, it is noted that he was not issued a verbal warning or written reprimand for this incident. Likewise, while Farmer told Brand that he did not want Arnold as an employee because he constantly had to follow up on him, it is significant that in the eight to ten months that he supervised Arnold, Farmer did not issue any verbal warnings or written reprimands to him for not following instructions or constantly having to follow up on his performance.

In order to support the termination of Arnold, Respondent relies on the two prior warnings that are in his personnel file. The first written reprimand occurred on November 2, 1994, approximately seven months after Arnold commenced employment, and cited him for

permitting meat scraps to remain on the table top areas (General Counsel Exh. No. 9). The second written reprimand was issued on January 3, 1996, and noted that Arnold did not follow the verbal instructions of his supervisor (General Counsel Exh. No. 10). No other verbal warnings or written reprimands were found in his personnel file.

Under these circumstances, such actions suggest a predetermined plan to create a reason to discharge Arnold and thus rid the facility of a union activist. In this regard, the General Counsel introduced evidence to establish disparate treatment when comparing the disciplinary records of other employees who were not terminated and continue to remain employees of Respondent. For example, employee Jerry Ross was issued a verbal warning for violating the Respondent's personal hygiene policy (November 21, 1995) and two verbal warnings for not following instructions (October 22 and 29, 1996), but he continues to be gainfully employed at Respondent. Unlike Arnold, who also had two prior warnings for not following instructions, Ross was not terminated. It is further noted that Arnold's first warning took place in November 1994, a short time after he commenced employment. According to Brand, the receipt of two warnings by employee Jerry Bailey just a short time after he commenced employment (October 21 and November 1, 1994), despite the receipt of three additional warnings (June 9, 1995 and January 24 and July 22, 1996), was the primary reason that Bailey was not terminated when he received his fifth warning on July 22, 1996. Unlike Arnold, who received his first warning shortly after he commenced employment in April 1994, and only had a total of two warnings in his personnel file, Bailey continues to be an employee of Respondent. Thus, I find that a harsher disciplinary standard is applied to employees who supported and assisted the Union in comparison to those employees that did not engage in protected conduct.

Lastly, I find that Evans told Ron Neal and Coleman in November 1996, that there was some union activity taking place in the sausage kitchen and conclude that Farmer told Neal about his conversation with Arnold concerning the Union which led to the painting of the bathroom walls.

Accordingly, for the reasons noted above, I find that Respondent's suspension on February 7, and the termination of Arnold on February 10, violated Section 8(a)(1) and (3) of the Act. In regard to paragraph 6d (i) of the complaint, the General Counsel did not introduce any evidence to establish that Arnold was issued a written reprimand on February 7. Therefore, I recommend that this allegation be dismissed.

3. The Termination of Bill Burns

Bill Burns commenced employment at Respondent in October 1990, and remained gainfully employed until his termination on February 21. The majority of his employment was spent deboning hams under the immediate supervision of Bruce Evans.

In November 1996, Burns talked to Shane Mattingly about the Union. He received a Union card from Mattingly and after signing it, mailed it back to the Union. Burns attended several Union meetings, where he obtained approximately 50 Union authorization cards, and distributed them to Respondent's employees on his free time and after hours at their homes.

On December 6, 1996, Burns had a conversation with Evans in Randy Coleman's office. Also present in the office was an individual named "Red." Burns had a tape recorder in his pants pocket and taped the conversation.

The transcript of this conversation supports Burns testimony that Evans interrogated him

about his union activities, referred to him as a Union member and the kingpin of the Union, stated that Shane Mattingly will be fired and we will weed the employees out, and threatened Burns that if the plant goes Union and you think we are the enemy now, wait and see what will happen then (General Counsel Exh. No. 6). Additionally, Evans told Burns that he attended one or two four hour management meetings about the Union in the preceding two weeks.

On December 8, 1996, Burns and employee Matt Rusher were called to a meeting with Gary Coleman and Evans to talk about accepting a Group Leader position. During the course of the conversation, Burns asked whether the position involved more money and Coleman said, no. Both Burns and Rusher declined to accept the position. Burns also stated during the conversation that he refused to accept the position because he did not want to inform on other employees. Evans said, "that's one of those fucking Union things again," and "the Union thing is getting to your head."

Shortly after the December 8, 1996 meeting, Burns began to experience pronounced problems with his arm and elbow. He went to the doctor who diagnosed the problem as ulnar nerve entrapment (tennis elbow) and recommended that Burns consider surgery. Burns discussed the surgery option with Brand and he recommended that Burns talk to fellow employee Kenny Rudd, who previously underwent that type of surgery and was able to resume his position on the boning line. After discussing the procedure with Rudd, Burns underwent the surgery on January 3, and remained out of work for approximately two months until the doctor released him to return to his former job on February 24.

On February 14, Burns saw Brand at the plant when he dropped off a doctors statement to the Workman Compensation secretary and apprised him that the doctor would probably release him on February 21, to return to work effective, Monday, February 24. Brand said that was fine and we will talk about it when you bring in the doctor's release. In the interim week, Ron Neal and Brand discussed a number of employee injuries including Burns, and Brand apprised him that Burns would probably be released to return to work on February 24. Neal said, that he thought Burns underwent carpal tunnel syndrome release (CTS) surgery and Brand replied, that he thought the surgery was on his elbow. They pulled the doctor's note and it stated that Burns was diagnosed with and had surgery for both tennis elbow and CTS of the right wrist. Neal instructed Brand to determine whether Burns did actually have CTS surgery.[8]

[8] A long-standing unwritten policy, since at least 1990, existed at Respondent that if an employee underwent CTS surgery, and the employee worked in a highly repetitive job such as on the boning line, the employee would not be returned to that position. Rather, if a less demanding position was available, the employee would be offered such a position or given the option of a layoff until such a position became available (Respondent Exh. No. 27).

On February 21, Burns went to the plant to give Brand the doctors statement and to let him know that he was intending to return to work on February 24. Burns went directly to Brand's office and found Gary Coleman and Brand waiting to see him. Brand asked Burns whether he had undergone tennis elbow and CTS surgery and Burns acknowledged that on the date of surgery the doctor decided to complete both procedures. Brand said, under those circumstances, I do not think we can put you back on the boning line. The job is highly repetitive, is tough work and is hard on the wrists. Since we have seen many fines by the Occupational Safety and Health Administration for people being put back in highly repetitive jobs after this type of surgery, it has been our policy not to do that. However, we can move you to the night sanitation shift. Burns replied, that he could not work nights because of a baby sitting problem and could not afford to take a pay cut. Brand said, then we have the option of laying you off and calling you back later. Burns replied that you cannot do that either and he was going to come in on Monday and bone hams. Burns asked to see the Respondent's policy, since if there was a policy, it had to be in writing. Brand said he did not have to show Burns the policy. Brand said, we will not put you back on the boning table. The only way we could even consider that is for you to go back to the doctor and ask him to give you a written guarantee that this will never affect your hand again. Burns replied, that no doctor is going to give such a guarantee but he would get another statement from the doctor. Burns then left Brand's office.

Later on February 21, Burns returned to the plant and gave Brand a revised doctors statement.[9] Brand told Burns that the doctors statement is not good enough because it does not guarantee anything. Burns replied, that he will be back on Monday to bone hams and this was illegal. Burns asked for a copy of the doctors statement and Brand went upstairs, made a Xerox copy, and gave it to Burns.

Burns went directly to see Vice President of Operations, David Coomes, who told Burns that he would stand behind Brand and told him not to report to work on Monday, to bone hams. After talking to Coomes, Burns went directly to Ron Neal's office and walked in on Brand and Neal. He showed Neal a copy of the doctor's statement. Neal said, do not report on Monday to bone hams because we are going to terminate your employment, you no longer have a job here. We do not want you as an employee any more. Burns pulled a tape recorder from his pants and said, I got you and will see you in court. He then left Neal's office.

The General Counsel alleges that Burns was terminated on February 24, because of his support and assistance to the Union. The Respondent takes the position that due to its long-standing policy concerning CTS surgery and the rejection by Burns of an offer to transfer to another position, his refusal to consider a layoff until a less demanding position arose, and the inability of Burn's doctor to guarantee that if he came back to work it will never affect his hand again, privileged its decision to terminate him on February 24.

I find that the General Counsel has made a substantial showing that the Respondent was motivated by antiunion considerations in terminating Burns. In this regard, Evans interrogated Burns about his Union activities, referred to him as a Union guy and the kingpin and threatened more onerous working conditions if the Union came into the plant. Moreover, Evans admitted that he told Gary Coleman in late November 1996 about ongoing union activity at the plant, and Coleman was present in the December 8, 1996 meeting about the Group Leader position when Evans identified Burns as a Union supporter. Likewise, Evans

[9] The February 21 doctors note states that Burns has now recovered sufficiently to be able to return to regular work on February 24 with no restrictions, and may return to previous job without limitations (General Counsel Exh. No. 7).

statements in the transcripts of both the Burns and Mattingly conversations establish that during this time period he attended one or two lengthy management meetings about the Union. Accordingly, I conclude that both Coleman and Evans informed Neal and Brand about Burns and Mattingly's involvement in the Union.

The burden shifts to the Respondent to establish that the same action would have taken place in the absence of the employee's protected conduct.

The Respondent has advanced, as an affirmative defense, that its long-standing policy for employees experiencing CTS surgery privileged Burn's termination. I find in the particular circumstances of this case, that the Respondent used this policy in order to create a reason to discharge Burns and rid itself of one of the leading union activists. In this regard, I find that while Burns medical records state that he underwent tennis elbow and CTS surgery, at no time did the Respondent check with Burn's doctor to determine the extent of the CTS problem. Indeed, Burns testified that it was not until the date of the surgery that the doctor decided to go ahead with the CTS procedure. Likewise, I am not convinced that the Burns February 21 doctors statement, is any different then the doctors statement the Respondent accepted on behalf of Kenny Rudd.[10] Yet, Rudd was returned to the boning line and Burns was not given that opportunity. Rather, Respondent gave Burns three options. I find that each of these options was setting Burns up for failure. The offer of a night sanitation position at reduced pay to someone that had previously worked the day shift for six years and has a baby-sitting problem, is no option at all. Likewise, the option of a layoff to someone who was cleared by his doctor to return to his old job without limitations or restrictions is untenable. Lastly, even Brand told Burns that no doctor would give a written guarantee that going back to work after tennis elbow and CTS surgery will never affect your hand again.

Under these circumstances, I reject the Respondent's affirmative defense and find that it failed to demonstrate that it would have taken the same action against Burns even in the absence of his engaging in union activities. Rather, I find that the Respondent used its CTS policy in this case to shield its true reasons for the discharge.

Accordingly, for the reasons noted above, I find that Respondent's termination of Burns violated Section 8(a)(1) and (3) of the Act.

4. The Termination of Shane Mattingly

Shane Mattingly was employed at Respondent from May 1992 to February 27, when he was terminated for attempting to chew tobacco in the production area. He was hired at Respondent on the recommendation of his Uncle, Bruce Evans, and worked in the washroom at the time of his termination, cleaning dirty molds and carts that carried meat products.

In early November 1996, Mattingly contacted Union Director of Organizing H. Bruce Finley to inquire about organizing the employees at Respondent. Mattingly told five or six of Respondent's employees that Finley was coming to his house to discuss the possibility of forming a union but only one employee appeared for the initial meeting in mid-November 1996. At the meeting, Finley gave Mattingly approximately 100 union authorization cards that Mattingly along with fellow employees Bill Burns and Willie McKenzie distributed over a one week period prior to the Thanksgiving holiday. A second Union meeting was held at Mattingly's

[10] I feel he has reached maximum treatment benefits and I do not see any sign of permanent impairment (Respondent Exh. No. 28).

house in November 1996, and five employees attended. Thereafter, the Union began having weekly meetings at the Holiday Inn Hotel in Owensboro, all of which were attended by Mattingly.

The day after the first Union meeting in mid-November 1996, Evans and Mattingly had a conversation in the mold room before starting work. Evans said, " What's this I hear about the Union shit?" "He asked Mattingly what Union it was, how many people went to the meeting and how many meetings took place?" Mattingly replied, that he did not know what he was talking about. Evans further said, "all you are going to do is get a bunch of other people caught up in something they don't know anything about and you are going to get yourself fired along with other people." "We are going to be weeding them out." Evans told Mattingly to let him know about the next union meeting and said that you will never get a Union in here.

Shortly after the meeting, Mattingly contacted Finley who suggested that the next time something like this happened he should tape the conversation. For this purpose, the Union provided Mattingly with a tape recorder and two blank cassette tapes.

In late November 1996, Mattingly went into Evans office to ask about when he could take his floating holiday.[11] Before entering the office, Mattingly turned on the portable tape recorder that he kept in his shirt pocket. Evans asked Mattingly, whether he thought about what he told him in the first meeting and Mattingly replied, a whole lot. Evans said, "They're trying to weed them out." You know it too. Think about it. What you do is your own business; If what you think you are doing is right, you ought to go for it.

Approximately three weeks after the above noted late November 1996 conversation, Evans called Mattingly into his office. Once again, Mattingly taped this conversation. Evans asked Mattingly, "whether he was still pushing the Union thing?" Mattingly replied, "that he was not." Evans said, "I don't understand what the fuck you're doing here." "I don't really understand it at all." "I don't know who's brainwashed you on this thing but whoever it is, a fuckin union." "Is it Tony?" "Is Tony in the union thing?" "Is that where you get this shit from?" Evans then said, "I don't even know where you think a union could do any, anything different than what they do down here." Mattingly replied, "Treatment." Evans said, "You want treatment, let me give you treatment." "You get a goddammed union in down here and I guarantee to you the little things you guys do, the little things we let you do, that won't be no more." "You won't get none of that." "You don't ask off and get off." "You won't chew tobacco and fuckin get caught with it and not be fired."

Mattingly testified that he brought the tape recorder to work every day between the first and second conversation that he had with Evans. After the second taped conversation with Evans in December 1996, he took the tape recorder home and put it in his wife's locked jewelry box. Except for one time when Mattingly listened to both conversations, the tape recorder remained in the jewelry box until he gave it to Union representative George Shepherd in April 1997.

On February 12, Evans told Coleman that employee James Estes came to him to complain that Mattingly was bothering Estes during work hours and asked him whether he wanted to sign a union authorization card. Coleman met with Estes and after discussing the problem, it was decided to refer the matter to personnel so there would be a written record in

[11] A practice developed at Respondent that permitted an employee to take one holiday at their convenience.

the event Mattingly or another employee took some kind of future action against Estes. Coleman went to see Joe Brand and told him that Mattingly interrupted Estes during work hours and asked Estes to sign a union authorization card.

Brand instructed Coleman to send Mattingly to his office and when Mattingly arrived, Brand asked him whether he interrupted an employee while both of them were working. Mattingly admitted that he did, and Brand gave him a written reprimand for this incident. No mention of a union authorization card was raised by either Brand or Mattingly.

On February 24, a USDA tag was placed on some tumbler tops by the day process inspector. Later that day, when the evening inspector was checking the tag to determine whether it could be removed, he found a substance on the tag that he believed was tobacco. The inspector showed the tag to Evans who immediately called Coleman. The inspector showed Coleman the tag and he acknowledged that it looks like tobacco. Coleman opined that it might have come from the washroom and he promised the inspector that the matter would be followed up and that it would never happen again.[12] Coleman instructed Evans to meet with the three employees in the washroom and inform them that if they were caught chewing tobacco during work time in the production area, they could be terminated. Evans met with the three employees the next morning and informed them about the incident with the USDA tag, and the consequences if someone was caught chewing tobacco in the production area.

On February 26, Coleman walked into the washroom and looked at employees John Walstrom and Mattingly to see if they were chewing tobacco. He observed Mattingly standing in front of a pressure washer with a can of tobacco in his hand and a pinch, ready to put into his mouth. He told Mattingly that he should know better and said, he would be back to get him in a few minutes. Coleman went to see Brand who instructed him to bring Mattingly to his office. Coleman accompanied Mattingly to Brand's office and Brand asked Mattingly whether he was getting ready to put chewing tobacco into his mouth. Mattingly said yes, and acknowledged that Evans recently told him about the consequences of being caught with tobacco but gave no explanation to Brand for his actions.

Brand told Mattingly to go home while he discussed the status of his continued employment with senior Respondent officials, but to return in the morning for a final decision. Mattingly returned to Brand's office on February 27, and was told that he was being terminated for violating the Respondent's policy of chewing tobacco in the production area.

The General Counsel alleges in paragraphs 6f and h of the complaint that Mattingly was issued a written reprimand and was subsequently terminated because he formed, joined and assisted the Union. The Respondent takes the position that Mattingly was given a written reprimand for violating its policy of not talking to or interrupting employees during work hours and was terminated because of violating the chewing tobacco policy in the production area.

As stated earlier, the Board has indicated that the General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not

[12] Coleman suspected that since the tumbler tops were cleaned in the washroom, one of those employees was probably responsible for the tobacco being on the USDA tag. Indeed, Coleman knew that washroom employees John Walstrom and Shane Mattingly regularly chewed tobacco.

engaged in protected activity.

I find that the General Counsel has established that the Respondent was motivated by antiunion considerations in terminating Mattingly. First, the evidence overwhelming establishes that the Respondent, through Evans, had knowledge of Mattingly's leadership role in organizing the Union and interrogated and threatened him on three separate occasions concerning his involvement. Second, contrary to Brand and Neal's testimony that they did not specifically learn about Mattingly's involvement with the Union until February 12, I find that Evans participated in one or two four hour management meetings about the Union in late November or early December 1996. Thus, I conclude that Brand and Neal specifically knew that Mattingly was the leading union adherent at the plant. Further, Evans testified that he told Coleman in November 1996 about his conversation with former employee Rob Crow, who identified Mattingly as the Union kingpin. Significantly, it was Coleman who was involved in the incident concerning the written reprimand and Mattingly's termination for attempting to chew tobacco in the production area.

Respondent takes the position that it issued the written reprimand to Mattingly because he interrupted another employee while they both were working on the production line. Although the Respondent knew that Mattingly interrupted Estes to inquire whether he would sign a union authorization card, the written reprimand did not mention this issue. Rather, it solely concerned Mattingly's discussion of non-work related matters during work time. Under these circumstances, it cannot be established that the Respondent violated the Act as alleged in paragraphs 5m and n of the complaint. In this regard, both Mattingly and Brand testified that there were no discussions on February 12, about the Union or the signing of a authorization card. Therefore, in the absence of testimony and evidence to support that Brand interrogated Mattingly about his Union activities or that a rule was enforced prohibiting Mattingly from discussing the Union during work hours, I recommend that paragraphs 5m and n of the complaint be dismissed.

On the other hand, the Respondent was unable to produce any verbal warnings or written reprimands previously issued to employees for talking about non-work related issues during worktime nor did it contradict the credible testimony of several employees that they regularly talked about weekend activities or sports events while working on the production line and were never issued written reprimands. Moreover, Evans testified that employees regularly talked to each other while they were working on the production line and that he would never discipline any employee for talking about non-work related matters.[13]

In sum, the General Counsel established a strong prima facie case by presenting an abundance of evidence showing that the union activity of Mattingly was a motivating factor in Respondent's decision to issue the written reprimand. Respondent has failed to carry its substantial burden of showing by a preponderance of the evidence, that in the absence of Mattingly's union activity, the Respondent would have taken the same action. Accordingly, I find that by issuing the written reprimand on February 12, the Respondent violated Section 8(a)(1) and (3) of the Act.

The Respondent takes the position that Mattingly was terminated on February 27, for violating its chewing tobacco policy and was warned several days earlier that employees could be terminated if they were caught chewing tobacco.

[13] Evans testified that while some of the employees were working on the production line, they told him that Rusher's truck was observed at the Holiday Inn attending a Union meeting.

I find that the Respondent's reason for terminating Mattingly to be wholly without merit and conclude it is pretextual. In this regard, the Respondent admitted that before it terminated Mattingly, no other employee has ever been disciplined for chewing tobacco. Mattingly credibly testified that he regularly used chewing tobacco every day for approximately five years, that Evans and Coleman were aware of his tobacco use but took no action against him, and before the appearance of the Union in November 1996, a supervisor caught him using tobacco but did not issue any discipline. This was also acknowledged by Evans who told Mattingly that if the Union got in, the little things we let you do will not be tolerated anymore including the chewing of tobacco. Likewise, employees Burns, Rusher, McKenzie, and Dennis Todd credibly testified that they saw other employees regularly chewing tobacco, that supervisors observed employees engaging in these acts but never did anything about it nor issued any type of discipline .

Further undermining Respondent's affirmative defense is evidence that demonstrates disparate treatment. In this regard, Respondent's Personal Hygiene Policy, effective April 3, 1995, prohibits the use of Tobacco products, Food, Gum, Cough Drops and Beverages in any processing, packaging or shipping area of the plant. Indeed, USDA regulations restrict the use of these items. While the Respondent issued verbal warning reports to four individual employees for chewing gum on the production line (General Counsel Exh. Nos. 11,12, 13 and 14), it is noted that unlike Mattingly's termination, these employees were given the lightest form of discipline that can be imposed and remain employees at Respondent. Although the Respondent argues that it applies a different standard to those employees chewing gum because, unlike tobacco, you do not have to spit, the Personal Hygiene Policy does not make such a distinction. Moreover, it must be noted that Mattingly was not terminated for spitting tobacco but rather because he was observed by Coleman about to put tobacco into his mouth. I conclude that employees who did not openly support the Union were given less severe discipline for their first offense, unlike Mattingly, for violating the Respondent's Personnel Hygiene Policy.

Accordingly, for the reasons noted above, I find that Respondent's termination of Shane Mattingly violated Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interrogating employees concerning their union sentiments, threatening employees with discharge if they selected the Union as their bargaining representative, created an impression among its employees that their Union activities were under surveillance, threatening its employees with reprisals if they did not disclose their Union activities, threatening its employees with more onerous working conditions if they selected the Union as their bargaining representative, threatening its employees that it would scrutinize the work performance of employees who supported the Union more stringently than that of employees who did not support the Union, and solicited its employees to report the Union activities of other employees.

4. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by issuing a written reprimand and terminating its employee Shane Mattingly,

suspending and terminating its employee Bill Arnold, and terminating Bill Burns for their engaging in union activities.

5. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by its issuance of a written reprimand to employee Bill Arnold or its assignment of more onerous working conditions, suspension, and termination of its employee Matt Rusher.

6. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatory discharged employees, Shane Mattingly, Bill Arnold, and Bill Burns, it must offer each of them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, International Fish & Meats, d/b/a Field Packing Company, Owensboro, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their Union membership, sympathy and activity.

(b) Threatening its employees with discharge if they selected the Union as their bargaining representative.

(c) Creating an impression among its employees that their Union activities were under surveillance.

(d) Threatening its employees with reprisals if they did not disclose their Union activities.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Threatening its employees with more onerous working conditions if they selected the Union as their bargaining representative.

(f) Informing its employees that it would scrutinize the work performance of employees who supported the Union more stringently than that of employees who did not support the Union.

(g) Soliciting its employees to report the Union activities of other employees.

(h) Discharging or otherwise discriminating against any employee for supporting United Food And Commercial Workers Union, Local 227, AFL-CIO, or any other union.

(I) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Shane Mattingly, Bill Arnold, and Bill Burns full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Shane Mattingly, Bill Arnold, and Bill Burns whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, suspension or written reprimand and notify the employees in writing that this has been done and that the discharges, suspension or written reprimand will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Owensboro, Kentucky, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its

[15] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 20, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 12, 1997

_____
Bruce D. Rosenstein
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees concerning their union sentiments, threaten employees with discharge if they select the Union as their bargaining representative, create an impression among our employees that their Union activities are under surveillance, threaten our employees with reprisals if they do not disclose their Union activities, threaten our employees with more onerous working conditions if they select the Union as their bargaining representative, threaten our employees that we would scrutinize the work performance of employees who supported the Union more stringently than that of employees who did not support the Union, and solicit our employees to report the Union activities of other employees.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Food and Commercial Workers Union, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Shane Mattingly, Bill Arnold, and Bill Burns full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the above noted employees whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge and written reprimand for Shane Mattingly, the unlawful discharge and suspension of Bill Arnold, and the unlawful discharge of Bill Burns, and

WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges, suspension or written reprimand will not be used against in any way.

INTERNATIONAL FISH & NEATS
D/B/A FIELD PACKING COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 575 North Pennsylvania St., Room 238, Indianapolis, Indiana 46204–1577, Telephone 317–226–7413.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees concerning their union sentiments, threaten employees with discharge if they select the Union as their bargaining representative, create an impression among our employees that their Union activities are under surveillance, threaten our employees with reprisals if they do not disclose their Union activities, threaten our employees with more onerous working conditions if they select the Union as their bargaining representative, threaten our employees that we would scrutinize the work performance of employees who supported the Union more stringently than that of employees who did not support the Union, and solicit our employees to report the Union activities of other employees.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Food and Commercial Workers Union, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Shane Mattingly, Bill Arnold, and Bill Burns full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the above noted employees whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge and written reprimand for Shane Mattingly, the unlawful discharge and suspension of Bill Arnold, and the unlawful discharge of Bill Burns, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges, suspension or written reprimand will not be used against in any way.

INTERNATIONAL FISH & NEATS
D/B/A FIELD PACKING COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

575 North Pennsylvania St., Room 238, Indianapolis, Indiana 46204–1577, Telephone 317–226–7413.